



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 15, 1994

Mr. Randel B. Gibbs
Mr. Michael S. Mitchell
Law Offices of Earl Luna, P.C.
4411 N. Central Expressway
Dallas, Texas 75205

OR94-365

Dear Mr. Gibbs and Mr. Mitchell:

On behalf of the Lancaster Independent School District, you ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 25478.

The requested information involves a disciplinary action against a teacher employed by the Lancaster Independent School District (the "school district"). Specifically, the request includes information concerning the disciplinary action, the minutes of two meetings of the school district's board of trustees, and statements made by the teacher. We understand that you have released the minutes to the requestor but that you request our determination regarding the following documents: written statements made by the teacher, the official letter of reprimand placed in the teacher's file in conclusion of the disciplinary action, and the teacher's signed acceptance of the reprimand.

You first suggest that section 552.102(a) of the Government Code may except some or all of the information in the records from public disclosure as "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.102 protects information only if its release would cause an invasion of privacy under the test articulated for section 552.101 of the act by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (*Industrial Foundation* test under section 552.101 predecessor for determining whether information is confidential under common-law privacy doctrine also applies to section 552.102 predecessor). Under the *Industrial Foundation* case, information may be withheld under section 552.101 and the common-law privacy doctrine "only if it contains highly intimate or embarrassing facts about a person's private affairs such that its release would be objectionable to a reasonable person and if the information is of no legitimate concern to the public." Open Records Decision No. 591 (1991) at 5 (citing *Hubert*, 652 S.W.2d at 550).

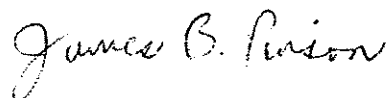
Having reviewed the requested documents you sent us, we find that the information relates to a matter of legitimate public concern, that is, an alleged assault of a student by a teacher in a public high school. We therefore need not consider whether the information contains highly intimate or embarrassing facts to conclude that section 552.102 does not apply and that you may not withhold release of the information on that ground.

You also suggest that the requested information is protected from required public disclosure under the act's "litigation" exception, section 552.103 of the Government Code. You inform us that a criminal proceeding is pending against the employee in question and contend that some or all of the information might be used against the employee in that prosecution. Although the litigation exception may be invoked by an agency that is not a party to criminal litigation, *see, e.g.*, Open Records Decision No. 141 (1976) (state auditor successfully raised section 552.103 predecessor in regard to information relating to possible criminal prosecution of former employee of University of Texas), the exception will not apply unless the attorney prosecuting the criminal charge determines that the requested information "should be withheld from public inspection." Gov't Code § 552.103(a)(1). In order for the school district to withhold any records pursuant to section 552.103, this office must first receive notice from the prosecuting attorney that the requested records relate to the pending prosecution and that they should be released, if at all, only during criminal discovery. *Cf.* Open Records Decision No. 141 (district attorney had advised that records related to possible criminal prosecution and should be withheld). We have received no such notice.

In any event, section 552.103 does not apply here because all the records submitted for our review have been seen by the school employee who is the defendant in the criminal proceeding. In the absence of special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Because the opposing party in the litigation has seen the information in these records, there is no justification for now withholding that information from the requestor pursuant to section 552.103. Therefore, you may not withhold the requested records under section 552.103.

Because case law and prior published open records decisions resolve your request, we are concluding this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



James B. Pinson
Assistant Attorney General
Open Government Section

JBP/LRD/rho

Ref.: ID# 25478

Enclosures: Submitted documents

cc: Mr. Danny and Ms. Lyne Knight
1217 S. Ridge
Lancaster, Texas 75146
(w/o enclosures)